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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CITY OF LOS ANGELES, a Municipal Corporation, ROBERT F. GALLEGOS, JAN J. HARRIS and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER and DONALD BUTTLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Does Section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. §§501, et seq.) permit a serviceperson, who is a co-plaintiff in a civil lawsuit and who has obtained a stay of proceedings in the trial court, to block the trial of his co-plaintiffs' lawsuit where the plaintiffs' causes of action are severable and independent?

2. Does Section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. §§, et seq.) place the burden of proving that a serviceperson's rights will not be materially affected by the denial of a stay of proceedings on the

party resisting the stay in all instances?

3. If a serviceperson has obtained a stay of proceedings pursuant to Section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. §§501, et seq.), and his co-plaintiffs are not entitled to protection by the Relief Act and are required to proceed to trial, is the mere possibility that the co-plaintiffs might lose their suit and thereby collaterally estop the serviceperson from relitigating either issues or legal theories previously decided, a sufficient basis under the Relief Act to permit the serviceperson to demand a stay of his co-plaintiffs' trial?

PARTIES IN THE COURT BELOW

Leroy Buttler and Donald Buttler were Plaintiffs-Appellants in the court below. The City of Los Angeles, a Municipal Corporation, Robert F. Gallegos, Jan J. Harris and Dwayne T. Merrill were Defendants-Respondents in the court below.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE CITY OF LOS ANGELES,
a Municipal Corporation,
ROBERT F. GALLEGOS, JAN J.
HARRIS and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER and DONALD BUTTLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

The Petitioners, City of Los Angeles, Robert F. Gallegos, Jan J. Harris and Dwayne T. Merrill respectfully pray that a writ of certiorari issue to review the judgment and opinion of the court of appeal of the State of California, Second Appellate District filed in this case on

April 23, 1986.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, applying the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §501, et seq.) to excuse respondents' compliance with Section 583(b) of the California Code of Civil Procedure requiring timely prosecution of civil lawsuits is unreported and is attached hereto as Appendix A.

JURISDICTION

Petitioners were respondents in this case in the Court of Appeal of the State of California, Second Appellate District below. The original opinion and judgment was entered on April 23, 1986. Petitioners' Petition for Rehearing in the California Court of Appeal was denied without opinion on

May 21, 1986. (Appendix B.) Petitioners' Petition for Hearing in the California Supreme Court was denied witnout opinion on July 9, 1986. (Appendix C.) This Petition is timely filed within 90 days of that date (28 U.S.C. §2101(c)). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. Section 521) Appendix D-1
2. California Code of Civil Procedure Section 583(b) Appendix E-1

STATEMENT OF THE CASE

On November 19, 1976 respondents Leroy and Donald Buttler, together with Victor Buttler (a father and his two sons), filed a civil lawsuit against the City of Los Angeles and three officers of the Los Angeles Police Department. Their complaint alleged causes of action against petitioners for assault and battery and false arrest and imprisonment. Petitioners filed their answer to the complaint on January 25, 1977, and the at-issue memorandum was subsequently filed on February 3, 1977. (Buttler v. City of Los Angeles, 153 Cal.App.3d 520, 522, 200 Cal.Rptr. 372, 373 (1984).)

During the years from 1978 to 1982 little activity occurred in the lawsuit in the trial court. Petitioners attempted to take respondent Victor

Buttler's deposition in December, 1978 and again in February, 1980, but were informed he was unavailable. On November 19, 1981, the five-year period established by California Code of Civil Procedure Section 583(b) expired. This Section mandates the dismissal of a civil action if it is not brought to trial within five years after being filed (Appendix E-1), although California courts have recognized certain exceptions excusing complaince.

On January 22, 1982, 63 days after the expiration of the five year period of California Code of Civil Procedure Section 583(b), petitioners filed a motion in Los Angeles Superior Court to dismiss respondents' action. Respondents opposed the motion asserting that the running of the five year period had been tolled by the operation of the

Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq., hereinafter Relief Act) for the entire period of Victor Buttler's military service. (153 Cal.App.3d at 523, 200 Cal.Rptr. at 374.) For the first time the trial court was informed, by Victor Buttler's declaration attached to respondents' opposition papers, that Victor had entered military service on November 6, 1978, had been asigned to overseas duty in March of 1979, and had been discharged from active military service in June of 1981. (153 Cal.App.3d at 523, 200 Cal.Rptr. at 374.) Respondents asserted additionally that it had been "impossible, impracticable and futile" (a recognized exception excusing compliance with California Code of Civil Procedure Section 583(b)) for Victor's

co-plaintiffs to proceed to trial in Victor's absence. On March 3, 1984, the Superior Court by minute order granted petitioner's motion to dismiss pursuant to California Code of Civil Procedure Section 583(b).

Respondents appealed the trial court's decision to the Court of Appeal of the State of California for the Second Appellate District. The Court of Appeal considered the question of whether the trial court committed error in dismissing the action in the context of Section 525 of the Relief Act. (153 Cal.App.3d 523, 200 Cal.Rptr. at 374.) The court found that application of Section 525 was mandatory and reasoned that it should be applied to suspend the running of California Code of Civil Procedure Section 583(b)'s five year time period in spite of the fact that

the five year period was admittedly not a "statute of limitation". (153 Cal.App.3d at 524-525, 200 Cal.Rptr. at 374.)

The Court of Appeal additionally examined the application of Section 521 of the Relief Act in respondents' case in light of the primary California Supreme Court authority interpreting this statute, Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665 (1946). (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376.) Consistent with the California Supreme Court opinion, the Court of Appeal found the fact that Victor Buttler had never applied for a stay of proceedings pursuant to Section 521 of the Relief Act irrelevant if the granting of a stay would have been mandatory if applied for. (153 Cal.App.3d at 526, 200 Cal.Rptr. at

376.) Further, the Court of Appeal opined in dicta that Victor may have been able to utilize Section 521 of the Relief Act to "block" the other respondents from proceeding to trial, thus bringing them within the recognized exception ("impossible, impracticable or futile") to California Code of Civil Procedure Section 583(b). (153 Cal.App.3d at 526-527, 200 Cal.Rptr. at 376.) Accordingly, the Court of Appeal reversed the trial court's order of dismissal and remanded the matter to the trial court for further proceedings to determine whether Leroy and Donald Buttler were excused from compliance with California Code of Civil Procedure Section 583(b). (153 Cal.App.3d at 527, 200 Cal.Rptr. at 376-377.)

Petitioners filed a Petition for Writ of Certiorari in this Court

requesting reversal of the Court of Appeal's decision. (City of Los Angeles, et al. v. Leroy Buttler, Donald Buttler and Victor Buttler, No. 84-257.) The petition was denied without opinion. (___ U.S. ____, 105 S.Ct. 253 (1984).)

On remand to the trial court, the lower court concluded that the action should be dismissed as to Leroy and Donald Buttler pursuant to California Code of Civil Procedure Section 583(b), and that Victor Buttler's lawsuit should proceed to trial. The trial court's minute order stated: "Victor's ability to prosecute his action would not have been materially affected by Donald and Leroy proceeding to trial in their cases." (Appendix A-4.) Respondents herein appealed from this second dismissal and the matter was once again

heard by Division Seven of the Second Appellate District Court of Appeal.

In an unpublished opinion, the court below reversed the trial court, disagreeing with the determination that Victor's ability to prosecute his action was not materially affected. (Appendix A-5.) No record of the hearing at which the trial court made this determination was provided on appeal, but the court of appeal nonetheless found that petitioners had not offered any evidence or argument that Victor's claims would not be materially affected if respondents had proceeded to trial, and concluded that petitioners had therefore failed to bear their burden of proof. (Appendix A-6.)

Having opined, in dicta, in the previous Buttler appeal, that Victor might have been able to block the other

plaintiffs from going to trial (Buttler v. City of Los Angeles, supra at 153 Cal.App.3d at 526, 200 Cal.Rptr. at 376), the court of appeal next determined that Victor was entitled to a stay of all proceedings in the trial court. (Appendix A-7.) This was so, the court reasoned, since Victor's rights could have been adversely affected if he were collaterally estopped from relitigating issues or theories put forward by respondents in a separate trial. (Appendix A-6, 7.) The court therefore found that it had been impossible for respondents to proceed to trial without Victor, that they were excused from compliance with the speedy prosecution statute, and that the trial court's determination should be reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE CALIFORNIA COURT OF APPEAL HAS RULED THAT A SERVICEPERSON, WHOSE OWN RIGHTS ARE PROTECTED BY A STAY OF PROCEEDINGS, MAY BLOCK THE TRIAL OF HIS CO-PLAINTIFFS' SEVERABLE AND INDEPENDENT LAWSUIT, A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT.

The question of whether Victor Buttler had a right to be present at the trial of his own lawsuit is not at issue in this petition for writ of certiorari. The court of appeal ruled that Victor was entitled to a stay, and this Court declined to overturn that determination. What is at issue in the case is whether Victor was entitled to

block his co-plaintiffs' trial when his own rights had been secured and, conversely, whether respondents could fail to diligently prosecute their case in reliance on the Relief Act.

In California, parties who bring a joint lawsuit pursuant to statutes permitting permissive joinder (California Code of Civi Procedure Section 378) nevertheless frequently have legally separate and distinct claims which might have been brought in separate actions. (Writers Guild of America, West, Inc. v. Superior Court, 273 Cal.App.2d 841, 846; 78 Cal.Rptr. 520, 523-524 (1969).) In the instant case, Donald, Leroy and Victor each had alleged damages as to them personally, and could logically have filed different lawsuits. A lawsuit brought pursuant to permissible joinder statutes may also be

ordered severed in order to prevent delay or in the interest of justice. (California Code of Civil Procedure Section 379.5.) The severability of the lawsuit at issue was specifically recognized by the Court of Appeal when it excused Victor's failure to comply with the speedy prosecution statute but remanded the matter to the trial court to determine whether respondents were excused from compliance.

In Buttler v. City of Los Angeles (1984) 153 Cal.App.3d 520, 200 Cal.Rptr. 372, the court of appeal, after deciding that the Relief Act protected Victor Buttler from dismissal of his action, remanded the matter to the trail court for a determination of whether respondents could have proceeded with their action without prejudice to Victor. (Id. at 153 Cal.App.3d at

526-527, 200 Cal.Rptr. 376.) This determination was necessary, the court opined, because if Victor could have blocked his father and brother from proceeding with their action, it would have been impossible for them to bring their lawsuit to trial within the statutory time period provided by California Code of Civil Procedure Section 583(b). (Ibid.) This comment in the first case, which was unsupported by any authority and which is clearly dicta when considered in light of the ruling in that first case, has been magically transformed in the instant case to a rule of law. (Appendix A-3.) Now, without any discussion and without any citation to supporting statutory or case authority, the court of appeal holds that a serviceperson may block a co-plaintiff's lawsuit which is

severable from his own. (Appendix A-3.) This is a question of federal law which, so far as petitioners have been able to ascertain, has not been but should be decided by this court.

The Relief Act does not grant an absolute right to a stay whenever a civil litigant is in the military service. It was instead intended to prevent any advantage to a civilian litigant or disadvantage to the serviceperson, and a stay will be granted only where the rights of the serviceperson would be prejudiced. (Johnson v. Johnson, 59 Cal.App.2d 375, 382, 139 P.2d 33, 37 (1943).) Thus, the only protection contemplated by the Relief Act is for the service person within the context of his own lawsuit. Nothing in the Relief Act or in cases interpreting it contemplates the use of

the Act by a serviceperson as a sword to protect his co-plaintiffs from their own lack of diligence in prosecuting their severable lawsuit.

In citing this court's authoritative interpretation of the Relief Act in Boone v. Lightner, 319 U.S. 561, 87 L.Ed.2d 1587 (1942) in support of its holding, the court below has failed to note that Boone does not support their interpretation. The court misquotes Boone, and ignores the fact that this Court held that the absence of a serviceperson from litigation where his rights or liabilities were being adjudicated is prima facie prejudicial, and that the discretion vested in trial courts should not be withheld on "nice calculations" on whether prejudice may result from absence. (Boone v. Lightner, supra at 319 U.S. 575, 87

L.Ed. 1596.) Where the service person is not absent, however, where he has an opportunity to prosecute his own case, there are no "nice calculations" to be made because he will be able to protect his own rights. Nothing in the opinions relied upon by the court below, therefore, supports the conclusion that the service person can intrude into other lawsuits and "block" their prosecution to his own ends.

Petitioners have found no cases similar to the one at bar which have decided the same issue. In two cases where continuances of the entire action were ordered and co-litigants not permitted to pursue the matter in the serviceperson's absence, the rights of the serviceperson were plainly not severable and independent from the litigants before the court. For

example, in Lankford et al. v. Milhollin et al., 28 S.E.2d 752 (Ga. 1944), a group of plaintiffs, including two servicemen, petitioned for an accounting. (Id. at 753-754.) The defendants to the action filed a cross-petition praying for a division of the property and sale of the land. (Id. at 754.) As to this cross-petition, the Georgia Supreme Court found that the trial court should have granted the request of the plaintiffs' lawyer for a continuance of the entire cross-petition. (Id. at 758.) The lawyer had testified extensively with regard to the necessity of the servicemen's being present, arguing that they might be able to raise the money to buy the property if they were present and that the land should not be partitioned and sold in their absence.

(Id. at 754-756.)

In Post et al. v. Thomas et al., 170 N.Y. Supp. 227 (1918), the Appellate Division of the New York Supreme Court ordered a continuance of an appeal sua sponte when it became apparent that one of two co-plaintiffs was in the service. (Id. at 228.) The serviceman was unrepresented on appeal and would apparently have been solely liable for a large bill of costs if his co-plaintiff was successful on his own appeal. The court felt the serviceman's presence was necessary in order for his rights to be protected. (Ibid.)

What may be gleaned from Lankford and Post is that a continuance of the entire proceeding may be ordered where the serviceman's rights or interests will be adjudicated in his absence and where he is effectively unrepresented

before the court. In Post, the serviceman's lawyer had died and he was without counsel and not before the court in a proceeding which could have resulted in significant economic costs being ordered against him. (Post et al. v. Thomas et al., supra at 170 N.Y. Supp. at 228.) In Lankford, the attorney who represented the two serviceman on the petition did not even wish to accept service of process for them on the cross-petition, and testified that he had nad no communication with them, did not know whether they could raise the money to purchase the land in question, and that the partition of the property would adjudicate their rights in their absence. (Lankford et al. v. Milhollin et al., supra at 28 S.E. 2d at 754-756.) Interestingly, while the

Georgia Supreme Court ruled that the requested continuance on the cross-petition should have been granted, nothing in Lankford indicates that the petition itself, in which the absent servicemen were joined as plaintiffs, could or should have been stayed.

The case at bar is not at all similar to Lankford or Post. Victor Buttler's rights or interests would not have been adjudicated in his absence because he had already been guaranteed the stay necessary for him to be present at trial of his lawsuit. No stay of the entire proceedings was required because, as the court of appeal recognized in the first action, Victor's rights were severable from those of his co-plaintiffs. He allegedly suffered injuries of his own as a result of the purported false arrest and assault and

battery, and was guaranteed his right to put this evidence before a jury at trial. Nothing in Lankford or Post would support the extension of the Relief Act to permit the absent serviceman to block the prosecution of his co-plaintiffs' suit when his own rights had been secured. This is, so far as petitioners are aware, a question which has not yet been considered by any court. It is certainly inappropriate that it should be determined by dicta in a state court opinion.

The court of appeal has been able to cite no authority in support of its interpretation of Section 521 of the Relief Act. Indeed, the logic of the rationale offered for its holding is so tenuous that it can not survive application to a hypothetical situation. For example, would the rule

apply if Victor had been involved in a riot between ten or twenty or thirty unrelated youths and the police? If all of the youths brought a civil lawsuit against the police and their employer, and only one joined the service during the pendency of the lawsuit, would that one individual be able to block the entire case, with dozens of witnesses awaiting his release and potential logistical problems compounded by delay? Even if the serviceperson were protected, and his claim severed from the rest of the lawsuit, could he still block his numerous co-plaintiffs from proceeding? Could his co-plaintiffs be excused from complying with speedy prosecution statutes, and simply sit on their hands without any activity in the case, relying on the absent serviceman to protect them all from dismissals?

The court's ruling permits these unreasonable and inappropriate results and is therefore clearly erroneous.

This Court has not decided any case concerning the Relief Act since its 1942 decision in Boone. This interpretation of the Act as it applies in wartime, while providing some guidance for modern courts, nevertheless does not address many of the issues which have been raised since that time, and which will continue to arise. The California court of appeal has decided significant questions of federal law concerning the Relief Act. At least one of these decisions, that a serviceman whose own rights are protected can block his co-plaintiffs' action, was determined indirectly and in dicta. This court should not permit such potentially important questions to be answered in

such an off-hand manner by a state court. Petitioners therefore respectfully request that the within petition for certiorari be granted in order to settle this important question of federal law.

II.

THE CALIFORIA COURT OF APPEAL HAS INTERPRETED SECTION 521 OF THE RELIEF ACT TO PERMIT A SERVICEMAN TO BLOCK THE SEVERABLE LAWSUIT OF HIS CO-PLAINTIFFS IF THERE IS ANY POSSIBILITY HE MIGHT LOSE HIS OWN SUIT BECAUSE OF SOMETHING THAT OCCURS IN THE CO-PLAINTIFFS' SUIT, A QUESTION OF FEDERAL LAW SHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The court of appeal writes that

petitioners conceded that Victor Buttler's rights could have been materially affected if respondents were permitted to proceed to trial. (Appendix A-8.) This misstates petitioners' position. All petitioners conceded below was that the doctrine of collateral estoppel might be found to apply in the instant case if respondents had proceeded to trial in Victor's absence. Indeed, it was and is petitioners' position that this fact does not constitute the kind of "material affect" which Section 521 of the Relief Act protects against.

The court of appeal has ruled that the mere possibility that Victor might have been collaterally estopped to relitigate certain issues in his lawsuit if respondents had proceeded to trail before him would require invocation of

Section 521 of the Relief Act. (Appendix A-7.) In order to be collaterally estopped from litigating a certain issue, however, it must be affirmatively shown that a party was either a participant in the prior litigation, or was in privity with a party. (Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 894 (1942).) To be found in privity, a litigant's relationship to the prior lawsuit must have been "sufficiently close" that his legal rights were in fact represented in the prior action. (Clemmer v. Hartford Insurance Co., 22 Cal.3d 865, 875, 151 Cal.Rptr. 285, 289 (1978); Carden v. Otto, 37 Cal.App.3d 887, 892, 112 Cal.Rptr. 749, 752, (1974).)

In spite of expanded notions of privity, collateral estoppel will not be

applied if constitutional due process requirements are not satisfied.

> "Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. (Citation omitted.)" (Blonder-Tongue Laboratories, Inc. v. University of Illinois

Foundation et al., 401 U.S. 313, 328-329, 28 L.Ed.2d 788, 799-800 (1971).)

In order to receive due process of law, a party who is to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action, and the circumstances of the first action must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. (Clemmer v. Hartford Insurance Co., supra 22 Cal. 3d 875, 151 Cal.Rptr. 289.)

Initially, it is obvious that the doctrine of collateral estoppel, if applicable at all in the instant case to describe what might have happened if respondents had proceeded to trial prior to Victor, would apply equally to both

petitioners and respondents. Petitioners fail to perceive how a rule of law can be prejudicial if it applies with equal force to both sides. Petitioners, if they had lost the initial action against respondents, could also have been foreclosed from relitigating the legality of the arrest or other related issues against Victor. Victor would clearly have benefited from such an application and can hardly argue prejudice.

Moreover, if the doctrine had been applicable, Victor's constitutional right to due process of law would have been protected. Either his father and brother would have adequately represented his rights, or the doctrine could not have been invoked. Rather than seriously examining the question of whether collateral estoppel would have

applied, however, the court of appeal dismisses tne question as, apparently, a "nice calculation" which it need not decide. (Appendix A-7.) Essentially, then, the court has ruled that the possibility of losing at trial is alone sufficient to invoke the Relief Act. Thus, the element of "luck", "karma", "fate", what have you, to which every litigant is subjected when trying a lawsuit, becomes a sufficient basis for invoking federal statutory relief because the person being subjected to the "adverse affect" of the undiscriminating win-or-lose system of litigation is a serviceperson. If the possibility of losing was sufficient to activate the "adverse affect" component of Section 521 of the Relief Act, one wonders why Congress bothered bestowing discretion to grant a stay or not on a

trial court. Since every litigant faces the possibility of loss, the court's rationale would require no evidentiary showing whatsoever in order for a serviceperson to be virtually entitled to a stay of proceedings.

No adverse affect would have resulted to Victor Buttler if respondents had brought their lawsuit to trial within the stautory time period in Victor's absence. Either Victor's rights would have been sufficiently represented by his father and brother in the first trial, or his constitutional right to due process of law would have been protected to permit him to litigate issues that had already been decided in the first lawsuit. In neither instance would Victor's rights have been prejudiced.

The court of appeal in this matter

has decided an important question of federal law which has not been but should be decided by this Court. Petitioners have been able to find no authority for the proposition that the Relief Act permits a serviceperson to block his co-plaintiffs' lawsuit solely on the ground that he might later lose his own lawsuit because of issues decided in his co-plaintiffs' suit, when the serviceperson's own rights and interests are protected and not subject to unconstitutional deprivation. Guidance is needed from this Court to correct what could well become a burdensome and erroneous interpretation of the Relief Act by a state court of last resort.

In addition to incorrectly deciding an important question of federal law, the court of appeal below has

perpetuated legal authority in California which is in conflict with a variety of Federal Circuit Court of Appeal opinions interpreting Section 521 of the Relief Act. The determination that a serviceperson and his co-plaintiffs can sit and do nothing, permitting the local statutory time within which they are required to bring their civil lawsuit to trial to expire, and then revive their lawsuit by pointing out that one of the plaintiffs was in the service during some portion of time the action was pending, violates principles established in the federal courts and in other state courts the serviceman to do something to protect his own rights and not permitting him to, in effect, sit on his hands. By establishing a rule of law which also permits non-servicepersons to sit on

their hands in reliance on the ability of the serviceperson to get them excused from compliance with the speedy prosecution statutes, California stands almost alone in its misinterpretation of the Relief Act.

The basic assumption of the California Supreme Court in this state's seminal authority on the Relief Act, Pacific Greyhound Lines v. Superior Court, supra, that a service person need do nothing to protect his rights when suing or being sued civially, lies at the heart of the court of appeal's opinion challenged herein. This assumption is in clear conflict with federal authority, such as, for example, Gross v. Williams, et al., 149 F.2d 84 (8th Cir. 1945).) In Gross the Circuit Court determined that it was not error to deny a stay of proceedings pursuant

to Section 521 of the Relief Act when the basis asserted for the stay was the "mere fact of service in the armed forces." (Id. at 149 F.2d 86.)

Similarly, in Tabor v. Miller, 389 F.2d 645 (3rd Cir. 1968), the denial of a stay was upheld since the defendant serviceman failed to demonstrate that it would have been "impossible" for him to appear at trial. (Id. at 389 F.2d 647.) An assertion of "unavailability" or "inconvenience" was simply not deemed sufficient to invoke the protection of Section 521 of the Relief Act. (Id. at 389 F.2d 646-647.)

Finally, in Crowder v. Capital Greyhound Lines, 169 F.2d 674 (D.C. Cir. 1948), the court upheld the dismissal of an action for lack of prosecution in spite of the plaintiff's assertion that he was entitled to a stay under the

Relief Act. Some three years after the action had been filed, the defendant calendared the case for trial, and the plaintiff's attorney appeared and requested and received a stay on the ground that the plaintiff was in the Army. (Id. at 169 F.2d 674.) Two more years passed with no further activity and the defendant moved to dimiss for lack of prosecution. (Ibid.) On appeal after the granting of the dismissal, the court upheld the dismissal, ruling that the Relief Act ". . . must be construed as imposing some duty on the person seeking shelter under its terms;. . . ." (Id. at 169 F.2d 676.) The plaintiff's failure to timely prosecute his lawsuit thus was not excused.

The clear import of the above-cited federal opinions, taken together with

this court's interpretation of Section 521 in Boone v. Lightner, supra at 319 U.S. 561, 87 L.Ed. 1587, rebuts the assumption of the California Supreme Court in Pacific Greyhound. The conflict thus illustrated between federal cases interpreting Section 521 of the Relief Act and requiring some affirmative action on the part of the serviceperson to protect his rights, and California cases sanctioning inaction, should be resolved by this Court by granting the within petition. Indeed, the court of appeal herein has taken the California line of authority to new heights of absurdity by permitting not only the serviceman but his non-military co-plaintiffs as well to ignore the requirement of diligent prosecution. This Court should grant the petition for certiorari in order to authoritatively

interpret the Relief Act for the first time since 1942 and resolve the conflict between California authoirty and principles of law followed by the federal circuits.

III.

THE CALIFORNIA COURT OF APPEAL HAS RULED THAT THE BURDEN OF PROVING THAT A SERVICEMAN'S RIGHTS WILL NOT BE MATERIALLY AFFECTED RESTS IN ALL CASES ON THE PERSON RESISTING A REQUESTED STAY OF PROCEEDINGS, A DETERMINATION IN CONFLICT WITH THIS COURT'S DECISION IN BOONE v. LIGHTNER, SUPRA.

In its opinion, the court of appeal ruled that a defendant

> ". . . seeking a dismissal for falure to prosecute [has] the burden of proving that proceeding with the action

> would not have materially affected the claims of the party in military service." (Appendix A-5.)

As authority for this proposition, the court cited Pacific Greyhound Lines v. Superior Court, supra at 28 Cal.2d. at 67, 168 P.2d at 668.) Even a casual examination of Pacific Greyhound reveals, however, that the California Supreme Court failed to assign the burden of proof so unequivocally to defendants. Rather, the Court noted:

> "The Soldier's and Sailor's Relief Act, supra, leaves discretion in the trial court in resolving the issue as to whether 'the ability of plaintiff to conduct his defense is . . . materially affected by reason of his

> military service' but it, in effect, places the burden of proof upon the party resisting a postponement and 'unless, in the opinion of the court, the ability of . . . [the party to prosecute or defend] is not materially affected' a postponement of the trial by the court is mandatory 'on application to it by such person or some person on his behalf.'" (Pacific Greyhound Lines v. Superior Court, supra at 28 Cal.2d 67, 168 P.2d 668.) Italics in original.)

By transforming a statement by the California Supreme Court, that a burden of proof "in effect" rests upon a certain party, into a rule of law that permanently assigns such a burden of

proof, the court of appeal has distorted the meaning of the Relief Act and failed to follow authority interpreting the Act announced by this Court.

This Court has authoritatively interpreted Section 521 of the Relief Act in Boone v. Lightner, supra, and the court of appeal was bound by principles of stare decisis to follow that opinion. (Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 75 L.Ed. 983, 990 (1931).) This Court in Boone determined that the Relief act in general, and Section 521 in particular, is not mandatory, and found that the Legislature had deliberately chosen the language of the statute to confer discretion on the trial court. (Boone v. Lightner, supra at 319 U.S. at 564-565, 569, 87 L.Ed. at 1590-1591.) Thus, in place of mandating a "rigid and

undiscriminating suspension of civil proceedings," the Court found that judicial discretion was ". . . the very heart of the policy of the Act." (Ibid.)

Moreover, the opinion in Boone makes it clear that this discretion is available to a trial court not only on the question of whether relief will be granted, but also on the issue of which party bears the burden of producing evidence on the question of the ability of a party to proceed with the action.

> "We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment." (Boone v. Lightner, supra at 319 U.S. 570, 87 L.Ed. 1593.)

On the question of whether a party's

ability to conduct the case will be "materially affected by reason of his military service", a trial court may, in certain circumstances, demand such proof from the moving party on the request for a stay. (Id. at 319 U. S. 569-570, 87 L.Ed. 1591-1593.) This determination is far more in keeping with the rationale of the Relief Act and avoids situations, such as the one in which the court of appeal has placed petitioners, where a party would unfairly be asked to prove a negative.

The court of appeal below has not only ignored this Court's holding in Boone, but decided that petitioners failed to meet their assigned burden of proof on the basis of an inadequate record on appeal. A court reporter was present at the hearing at which the trial court was directed to decide

whether Victor's rights would have been adversely affected if respondents had proceeded to trial, but no transcript of proceedings was included in the record on appeal. For the court of appeal to blithely announce that petitioners offered no evidence, either testimonial or in argument, is therefore plainly unfounded and inaccurate. (Appendix A-6.)

Moreover, the effect of the court's ruling permanently assigning the burden of proof, effectively forecloses a defendant from ever obtaining a dismissal for failure to diligently prosecute if a serviceman is even tangentially involved in the lawsuit. Not only must the defendant prove a negative in all instances (that the rights of the serviceperson will not be affected), even where the serviceman has

an independent action and has been assured of his right to be present at the adjudication of his own interests, but the defendant must also prove that there is no possibility that any determination in the lawsuit involving non-military co-plaintiffs will result in the serviceperson's loss of his lawsuit. Such a burden is, frankly, little better than impossible.

By permanently assigning a burden of proof to petitioners herein the court below has ignored the central holding of Boone which grants a trial court wide discretion to deterine how to apply the Act and how to assign the burden of proof. The petition for certiorari should be granted in order to correct this obvious misinterpretation of Boone and Section 521 of the Relief Act.

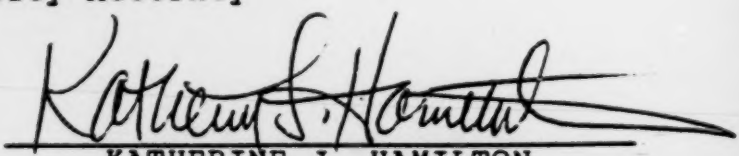
CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari and set aside the decision of the California Court of Appeal, Second Appellate District.

DATED: September 23, 1986.

Respectfully submitted,

JAMES K. HAHN, City Attorney
JOHN T. NEVILLE, Senior Assistant City Attorney
RICHARD M. HELGESON, Assistant City Attorney
KATHERINE J. HAMILTON, Deputy City Attorney

By 
KATHERINE J. HAMILTON
Deputy City Attorney

Attorneys for Petitioners

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

DIVISION SEVEN

LEROY BUTTLER and DONALD BUTTLER, Plaintiffs and Appellants, vs. CITY OF LOS ANGELES, et al., Defendants and Respondents.	No. B008744 (LASC No. C181072) Filed April 23, 1986

APPEAL from an order of the Superior Court of Los Angeles County. Norman R. Dowds, Judge. Reversed.

Haight, Dickson, Brown & Bonesteel and Roy G. Weatherup and Robert M. Dato for Plaintiffs and Appellants.

James K. Hahn, City Attorney, John

T. Neville, Senior Assistant City Attorney, Richard M. Helgeson, Assistant City Attorney, and Katherine J. Hamilton. Deputy City Attorney, for Defendants and Respondents.

Leroy and Donald Buttler appeal from an order dismissing their action for failure to bring the case to trial within five years of its commencement. (Code of Civ. Proc., §583.310.) We reverse.

FACTS AND PROCEEDINGS BELOW

Leroy Buttler and his sons Donald and Victor Buttler commenced this action in 1976. The complaint seeks damages from the City of Los Angeles and eight of its police officers for false arrest, false imprisonment, assault and battery.

In 1982 the trial court dismissed the claims of all three defendants under

the five-year rule. We reversed the order of dismissal. (Buttler v. City of Los Angeles (1984) 153 Cal.App.3d 520, cert. den. (1984) 105 S.Ct. 253.) We held Victor Buttler's claims could not be dismissed because the five-year period was tolled during the time he was in military service. (50 U.S.C. App. §525; 153 Cal.App.3d at p. 524.) We also held Victor Buttler had the right to prevent his father and brother from proceeding on their own claims during the time he was in military service if his ability to prosecute his claim would be "materially affected" by his father and brother prosecuting theirs. (50 U.S.D.C. App., §521; 153 Cal.App.3d at p. 526.) Because it did not appear the trial court considered the possibility Donald and Leroy Buttler's prosecution

of their claims could materially affect Victor Buttler, we reversed the order of dismissal as to Leroy and Donald Buttler so that the trial court could reconsider the matter in this light. (Id., at p. 527.)

The trial court did reconsider the matter in light of section 521 and found "Victor's ability to prosecute his action would not have been materially affected by Donald and Leroy proceeding to trial in their cases." The court, again, dismissed the claims of Leroy and Donald Buttler.

DISCUSSION

The trial court correctly understood the issue on remand to be whether Victor could have obtained an order staying the trial of his father's and brother's claims against the

defendants. "If Victor Buttler could have invoked section 521 . . . to block the other plaintiffs from going to trial then, as a matter of law, it would have been objectively impossible for them to prosecute their actions while he was in military service." (Buttler v. City of Los Angeles, supra, 153 Cal.App.3d at p. 526.)

The trial court concluded trying the other plaintiffs' claims would not have materially affected prosecution of Victor Buttler's claims. We disagree.

Defendants seeking a dismissal for failure to prosecute have the burden of proving that proceeding with the action would not have materially affected the claims of the party in military service. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal.2d 61,

67.) Defendants offered no evidence or argument Victor Buttler's claims would not be materially affected if the claims of Leroy and Donald Buttler proceeded to trial. They argued instead Leroy and Donald Buttler would not be prejudiced if they went to trial without Victor Buttler. This was not the issue. Defendants failed to bear their burden of proof.

Defendants state candidly if they were successful in defending against the claims of Leroy and Donald Buttler they would argue collateral estoppel barred Victor Buttler from relitigating the same issues in his trial. For example, defendants contend if the jury in the first trial determines the officers had probable cause to arrest the plaintiffs, Victor Buttler "would probably be

collaterally estopped from retrying this issue in a subsequent trial." Defendants argue there would be no prejudice to Victor Buttler because for the doctrine of collateral estoppel to apply the trial court would necessarily have determined Victor Buttler was adequately represented at the preceding trial.

We need not decide whether collateral estoppel would apply in the example given by defendants or in numerous other conceivable circumstances. The protection section 521 affords military personnel does not turn on "nice calculations as to whether prejudice may result from absence." (Boone v. Lightner (1943) 319 U.S. 561, 575.) Indeed, prejudice, in the sense of reversible error, is not the test for

granting a stay order under section 521.[1/] Rather, "[i]f it appears that the rights of one in the service would, or might, be adversely affected because of such service, the court is required to protect his interests." (Johnson v. Johnson (1943) 59 Cal.App.2d 375, 383.) Defendants' collateral estoppel argument is not frivolous. (See Clemmer v. Hartford Ins. Co. (1979) 22 Cal.3d 865, 874-876.) Thus, defendants have conceded Victor Buttler could be materially affected if the other

---

[1/] 50 U.S.C. App. section 521 provides the court "shall" stay the proceeding before it on application by the person in military service "unless, in the opinion of the court, the ability of plaintiff to prosecute tne action . . . is not materially affected by reason of his military service."

plaintiffs' claims went to trial.

Defendants argue even if it was impossible for Leroy and Donald Buttler to go to trial while Victor Buttler was in the service it was not impossible for them to commence trial within the five-year period.

The five-year period expired in November 1981. Victor Buttler was on active duty in the Navy, stationed in Rota, Spain, from March 1979 to June 1981. These circumstances made it virtually impossible to include Victor Buttler in any aspect of trial preparation. Buttler's entitlement to a stay order under 50 U.S.C. App., section 521 expired 60 days after he completed his military service. We find unrealistic defendants' claim Victor, Leroy and Donald Butler [sic] could have

prepared and commenced trial in the four months remaining after Victor Buttler's rights under section 521 expired.

DISPOSITION

The order dismissing the action as to Leroy and Donald Buttler is reversed.

JOHNSON, J

We concur:

LILLIE, P.J.

THOMPSON, J.

APPENDIX B

NOTIFICATION OF DENIAL OF PETITION FOR REHEARING

RECEIVED
MAY 22 1986
Liability Section

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 7

City Attorney
Katherine Hamilton
1700 City Hall East
200 North Main Street
Los Angeles, CA 90012

MAY 21 1986

RE: Buttler, Leroy
vs.
Los Angeles, City of

2 Civil B 008744
Los Angeles No. C 181072

PETITION FOR REHEARING DENIED.

APPENDIX C

NOTIFICATION OF DENIAL OF PETITION FOR REVIEW

RECEIVED
JUL 14 1986
Liability Section

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District,Division 7,No. B 008744

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

BUTTLER et al.

v.

CITY OF LOS ANGELES et al.

Respondents' petition for review DENIED.

SUPREME COURT
F I L E D
JUL 9 1986
Laurence P. Gill,Clerk

Deputy

BIRD

Chief Justice

APPENDIX D

SECTION 521

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 50 U.S.C.APP. §501, et seq.

§521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE §583(b)

CALIFORIA CODE OF CIVIL PROCEDURE

§583 Dismissal; lack of prosecution; failure to bring action to trial

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

Supreme Court, U.S.
FILED
JAN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-532

In the Supreme Court of the United States

October Term, 1986

CITY OF LOS ANGELES, et al.,

Petitioners;

v.

LEROY BUTTLER and DONALD BUTTLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Where a state mandates that all civil cases commence trial within five years of the filing of the complaint but tolls all time where it would be "impossible, impractical, or futile" to bring the case to trial, is it a question of state law as to whether such tolling occurred as to all plaintiffs in a case where one of the plaintiffs obtains a stay pursuant to section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. Appen. section 521)?

2. Does section 521 of the Soldiers' and Sailors' Civil Relief Act allow a court to place the burden of proving that the serviceman's rights will not be materially affected by the denial of a stay of proceedings on the party opposing the stay where the opposing party admits that it would invoke the doctrine of collateral estoppel to preclude the serviceman's cause of action?

3. If a serviceman has obtained a stay of proceedings pursuant to section 521 of the Soldiers' and Sailors' Civil Relief Act, is the realistic possibility that two co-plaintiffs might not prevail in their suit and thereby collaterally estop the serviceman from relitigating issues determined in the first suit a proper basis under the Relief Act to permit the serviceman to obtain a stay of his co-plaintiffs' trial?

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No. 86-532

In the Supreme Court of the United States

October Term, 1986

CITY OF LOS ANGELES, et al.,

Petitioners,

v.

LEROY BUTTLER and DONALD BUTTLER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Leroy and Donald Buttler hereby oppose the petition for writ of certiorari to the Second Appellate District of the California Court of Appeal. For the reasons that follow, respondents respectfully request that the petition be denied.

JURISDICTION

Respondents dispute petitioners' assertion that this court has jurisdiction over this matter pursuant to 28 U.S.C. section 1257(3). That statute allows review of

a state court decision by writ of certiorari where the validity of a statute of the United States is drawn into question. As more fully set out in the argument sections of this brief, respondents submit that this case turns entirely upon a state statute, California *Code of Civil Procedure* section 583(b), and not upon the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appen. section 521.

STATEMENT OF THE CASE

1. The Facts Leading Up To The First Appeal.

This is the second time in which petitioners have requested this court to review this case. In the first appeal, *Buttler v. City of Los Angeles*, 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984), *cert. denied*, 469 U.S, 883 (1984), the California Court of Appeal accurately summarized most of the pertinent facts, and parts of that summary are therefore quoted below:

> "On November 19, 1976, plaintiff Victor Buttler, his brother Donald, and their father Leroy filed suit against the defendants City of Los Angeles and eight of its police officers. Their complaint alleged that plaintiffs had been the victims of false arrest, false imprisonment, assault and battery by the defendant officers.
>
> "Plaintiffs began to prosecute their action in a diligent manner. One week after defendants answered the complaint plaintiffs filed their at-issue memorandum. Plaintiffs responded to interrogatories propounded by defendants in May 1977 and in August 1977 propounded their own interrogatories to defendants.
>
> "The superior court issued its first notice of eligibility to file a certificate of readiness in

March 1979. By that time plaintiff Victor Buttler was on active duty in the United States Navy stationed on board a ship in Rota, Spain.

"Victor Buttler commenced active military service on November 6, 1978. He was stationed in Spain during the period March 1979 through June 1981. He did not appear in response to defendants' notices of deposition in December 1978 and February 1980.[1]

"In January 1982 the matter not having been brought to trial within five years, defendants moved to dismiss pursuant to *Code of Civil Procedure* section 583, subdivision (b). Plaintiffs resisted this motion on the ground that plaintiff Victor Buttler had been on active duty in the United States Navy between November 1978 and June 1981 and that the five-year period was suspended as to all three plaintiffs during Victor Buttler's military service by reason of the Soldiers' and Sailors' Civil Relief Act (hereafter referred to as the Act.)

"At the hearing on defendant's motion to dismiss, the trial court made a tentative ruling denying the motion provided that plaintiffs move to specially set the matter for trial within 60 days. This ruling was made conditional on whether the Act applied to plaintiffs as well as defendants. The court requested supplemental points and authorities on this issue. After receiving the parties' supplemental briefs, the trial court granted defendants' motion to

---

[1]Plaintiffs' former counsel did, however, inform defendants at this time that Victor Buttler was serving in the armed forces.

> dismiss. Plaintiffs' motions for reconsideration and for relief on the ground of their mistake of law were denied. Plaintiffs also requested a Statement of Position from the court regarding, inter alia, the application of the Act to plaintiff Victor Buttler. The court did not respond to this request." 153 Cal.App.3d at 522-523, 200 Cal.Rptr. at 373-374.

2. The Decision In The First Appeal.

The California Court of Appeal reversed the trial court's first dismissal and remanded the case for further proceedings. *Buttler v. City of Los Angeles*, 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984). The court held that section 525 of the Soldiers' and Sailors' Relief Act, 50 U.S.C. Appen. section 525, tolled California's five year statute, *Code of Civil Procedure* section 583(b), while plaintiff Victor Buttler was in military service. 153 Cal.App.3d at 525, 200 Cal.Rptr. at 375.

The issue that necessitated the remand as to Leroy and Donald Buttler was the effect of section 521 of the Soldiers' and Sailors' Relief Act, 50 U.S.C. Appen. section 521. Under that statute, a person in military service may apply for a stay of any proceeding. As noted by the Court of Appeal, that statute mandates "a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected." 153 Cal.App.3d at 526, 200 Cal.Rptr. at 376. The court then stated:

> "Here no application for a stay was actually made but that does not preclude the court from considering, for purposes of section 583, subdivision (b), whether a stay would have been mandatory if it had been applied for. (*Pacific*

> *Greyhound Lines v. Superior Court, supra*, 28 Cal.2d at p. 67; *Rauer's Law, supra*, 76 Cal.App.2d at p. 858.) If Victor Buttler could have invoked section 521 of the Act to block the other plaintiffs from going to trial then, as a matter of law, it would have been objectively impossible for them to prosecute their actions while he was in military service. Thus it may have been 'futile' for the other plaintiffs to have sought a trial while Victor was in the service since he would have been entitled to stay that trial." 153 Cal.App.3d at 526, 200 Cal.Rptr. at 376.

The Court of Appeal then stated that the trial court apparently did not consider whether Leroy and Donald Buttler's prosecution of their action could be prejudicial to Victor Buttler's ability to prosecute his claims:

> "[U]nder title 50 United States Code, Appendix Section 521 Victor *may* have been entitled to stay the other actions as well as his own because of prejudice *to him* from a separate trial of those lawsuits. We are reversing the order of dismissal as to Leroy and Donald Buttler so that the trial court can reconsider the matter in this light." 153 Cal.App.3d at 527, 200 Cal.Rptr. at 377 (emphasis in original).

3. Further Proceedings In The Trial Court.

On June 26, 1984, after denial of certiorari by this court (469 U.S. 883 (1984)), plaintiffs Leroy and Donald Buttler filed their motion for further proceedings consistent with the opinion of the Court of Appeal. In their moving papers, plaintiffs focused on the harm that would inure to Victor Buttler if they had been forced to go to trial without him. First, if a jury were to find

against Leroy and Donald, such a finding could be used to collaterally estop Victor from litigating his claims. Further, all plaintiffs were also percipient witnesses, and the jury might therefore not receive a full account of the events surrounding the police officers' action. Moreover, if Leroy and Donald were to try the case without Victor, defendants could point the finger of accusation as to alleged crimes or suspicious circumstances at the missing plaintiff or plaintiffs. Finally, even assuming a verdict in favor of Leroy and Donald, the jury might not have enough first hand evidence to find for Victor. This would then require Victor to proceed to a second trial on essentially the same issues, resulting in an unnecessary and wasteful multiplicity of actions.

On August 17, 1984, defendants then filed their opposition papers. Conspicuous by its absence is *any* showing of prejudice that would result to defendants if Leroy and Donald Buttler remained in the suit. Such a showing would be impossible, of course; the City and its officers would be required to defend the suit brought by Victor Buttler regardless of the presence or absence of the other plaintiffs.

On August 22, 1984, the motion came on for hearing in the trial court. The court dismissed the case pursuant to *Code of Civil Procedure* section 583(b) as to Leroy and Donald Buttler, stating without analysis or elaboration in the minute order that "Victor's ability to prosecute his action would not have been materially affected by Donald and Leroy proceeding to trial in their cases."

4. The Decision In The Second Appeal.

Plaintiffs Leroy and Donald Buttler appealed their dismissal to the California Court of Appeal, which reversed in an unpublished opinion (appendix "A" to

petition for writ of certiorari). The court held that, under the circumstances of this case, defendants had the burden of showing that the denial of a stay would not have materially affected serviceman Victor Buttler's rights. The court held that defendants had failed to sustain this burden, especially where they had conceded that they would have attempted to invoke the doctrine of collateral estoppel against Victor Buttler if they had prevailed in an earlier trial involving the other co-plaintiffs. The court noted that defendants' collateral estoppel argument would not have been frivolous, and that courts must protect servicemen if they might be adversely affected absent a stay. Since Victor Buttler could have stayed the entire action in order that all three plaintiffs could proceed to trial at the same time against defendants, the Court of Appeal held that it was "impossible, impractical or futile" for Leroy and Donald Buttler to have complied with California *Code of Civil Procedure* section 583(b).

SUMMARY OF ARGUMENT

Respondents respectfully submit that review of this case by this court would be both improper and unnecessary. Contrary to petitioners' assertions, this case involves primarily questions of state rather than federal law. Under California law, all plaintiffs in civil cases must bring their actions to trial within five years of the filing of the complaint; there are, however, certain judicially-created exceptions to this "five year statute." One of the exceptions provides that the statute is tolled where, for some reason, trial would be "impossible, impractical or futile." In *Buttler v. City of Los Angeles*, 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984), *cert. denied*, 469 U.S. 883 (1984), the California Court of Appeal determined that plaintiff Victor Buttler, a serviceman, was entitled to a stay of his action against

petitioners under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appen. section 521, which thereby tolled the five year statute as to him. The case was remanded to the trial court for a determination as to whether an earlier trial involving the other two co-plaintiffs could affect Victor Buttler's rights such as to entitle him to a stay of the entire action. In this second appeal, the California Court of Appeal held that Victor Buttler's rights might be affected, that a stay of the entire action would have been proper, and that therefore it was "impossible, impractical or futile" for respondents Leroy and Donald Buttler to comply with California's five year statute. For these reasons, and others to be analyzed in detail below, it is submitted that this case involves the interpretation of a state statute, California's "five year statute," and that review by this court is therefore improper.

Even if this case somehow concerns the applicability of a federal statute, respondents contend that review by this court is unnecessary because no important question has been presented. Petitioners foresee dire consequences as a result of the California Court of Appeal's decision, but it is difficult to comprehend those fears when one realizes that the state court opinion was not even published. Even assuming that one accepts petitioners' strained reading of the Court of Appeal's decision, that decision has no ramifications beyond the parties to this case. Intervention by this court is therefore wholly unnecessary.

ARGUMENT

I.

REVIEW BY THIS COURT IS IMPROPER BECAUSE THIS CASE TURNS ON THE INTERPRETATION OF A STATE STATUTE.

The "presence" of a federal statute in this case is both illusory and deceiving. Petitioners claim that the California Court of Appeal has "incorrectly decided an important question of federal law" by making a sweeping and erroneous interpretation of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appen. section 521. What the Court of Appeal in fact held, however, is that two non-military plaintiffs were excused from complying with California's statutory provision requiring all civil cases to commence trial within five years of the filing of the complaint because it was "impossible, impractical or futile" for them to comply with that statute. It was "impossible" for these plaintiffs to bring their case to trial within five years because of a prior judicial determination that co-plaintiff Victor Butler was entitled to a stay pursuant to the Soldiers' and Sailors' Civil Relief Act. *This determination is final because this court has already denied certiorari. Buttler v. City of Los Angeles*, 153 Cal.App.3d 520, 200 Cal.Rptr. 372, *cert. denied*, 469 U.S. 883 (1984). Petitioners' attempt to close the barn door three years after the horse has escaped must fail.

Because the first appeal in this case has long since become final, it is necessary to determine what issues were determined in that appeal and what issues were adjudicated in this, the second appeal. In its 1984 decision, the Court of Appeal made three determinations: (1) Section 525 of the Act, which tolls any period limiting "the bringing of any action" by a person in

military service for the time in which he is in the military, applied to California's "five year statute," *Code of Civil Procedure* section 583(b), and that the dismissal of serviceman Victor Buttler's action for failure to comply with the five year statute was therefore erroneous (153 Cal.App.3d at 523-526, 200 Cal.Rptr. at 374-376); (2) Serviceman Victor Buttler was also entitled to the protection of section 521 of the Act, which provides for a mandatory stay unless the court is satisfied that plaintiff's ability to prosecute his case is not materially affected by reason of his military service (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376); and (3) Serviceman Victor Buttler's stay under section 521 could apply to the entire action if his rights would be prejudiced by the continued prosecution of the case by co-plaintiffs Leroy and Donald Buttler—if so, it would be "impossible, impractical, or futile" under California *Code of Civil Procedure* section 583(b) to bring the case to trial within five years. (153 Cal.App.3d at 526-527, 200 Cal.Rptr. at 376-377). The Court of Appeal therefore remanded the case for a determination as to whether Victor Buttler's rights would have been prejudiced if his co-plaintiffs had brought their case to trial in a timely fashion in compliance with California's five year statute. 153 Cal.App.3d at 527, 200 Cal.Rptr at 376-377. These determinations, especially that where serviceman Victor Buttler was entitled to a stay pursuant to section 521 of the Act, became final when this court denied certiorari. 469 U.S. 883 (1984).

The issues decided in the present appeal, however, are considerably narrower and of less import, as the Court of Appeal impliedly recognized when it elected not to publish the opinion of the second appeal in the

official reports.[2] The Court of Appeal merely concluded that it would have been "impossible" for Leroy and Donald Buttler to have complied with California's five year statute. This was so because the City of Los Angeles conceded that it would use the doctrine of collateral estoppel against serviceman Victor Buttler if it were successful in defending the claims of the other two non-military plaintiffs. Since the language of section 521 of the Act clearly states that its stay will issue unless "the ability of the plaintiff to prosecute the action . . . is not materially affected by reason of his military service," the Court of Appeal concluded that the City's concession invoked section 521 and made it "impossible" for Leroy and Donald Buttler to have complied with California's five year statute. The "impossibility" doctrine was developed by California courts as an implied exception to the state's five year statute. See, e.g., *Brunzell Construction Co. v. Wagner*, 2 Cal.3d 545, 86 Cal.Rptr. 297, 468 P.2d 553 (1970).

It is a standard tenet of federalism that this court is bound to accept the interpretation of state law by the highest court of that state. See, e.g., *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312 (1976); *Speiser v. Randall*, 357 U.S. 513, 522 n. 7, 78 S.Ct. 1332, 1340

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[2]Rule 976(b) of the California *Rules of Court* prohibits publication of a Court of Appeal opinion unless the opinion: "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature . . . ." The Court of Appeal obviously felt that the opinion in the second appeal did not meet any of those requirements. Indeed, if this case "created" any law, it was done in the first opinion.

n. 7 (1958).[3] The California Court of Appeal has determined, on the facts of this case, that it was "impossible, impractical or futile" for respondents to comply with a state statute, *California Code of Civil Procedure* section 583(b). This court cannot interfere with a state court interpretation of state law. The petition for writ of certiorari should therefore be denied on that basis.

II.

THE UNPUBLISHED OPINION OF THE CALIFORNIA COURT OF APPEAL FAILS TO RAISE ANY ISSUE WARRANTING REVIEW BY THIS COURT.

Petitioners have provided this court with a front row seat to the parade of horribles they envision will occur if the decision of the California Court of Appeal stands. One is left with the impression that, absent intervention by this court, a landmark case called *Buttler v. City of Los Angeles* will be cited and unjustly applied to defendants across the nation. As mentioned above, however, it is impossible for such a "horrible" result to occur, since the decision of the Court of Appeal was not certified for publication and therefore cannot be cited as authority in other cases. As discussed below, however, the Court of Appeal's opinion does not create a conflict with other state and federal decisions even if the opinion was officially published. Petitioners' parade has been rained on, and review by this court is unnecessary.

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[3]Since the California Supreme Court denied review of this case, the Court of Appeal's opinion has become "the highest court" of California for purposes of this case. Petitioners have conceded this point (see petition for writ of certiorari at p. 35).

A. This Case Does Not Present a Conflict Between California Decisional Law and Federal Circuit Cases Regarding How a Serviceman Should Protect His Rights in a Civil Action During Military Service.

Petitioners claim that the decision in this case and a decision relied on by the Court of Appeal, *Pacific Greyhound Lines v. Superior Court*, 28 Cal.2d 61, 168 P.2d 665 (1946), conflict with three federal circuit decisions on the issue of whether a serviceman is required to actively protect his rights in a civil suit while he is in military service. A review of the three federal decisions reveals that no such conflict exists, and that review by this court is therefore unnecessary.

In *Gross v. Williams*, 149 F.2d 84 (8th Cir. 1945), defendant Gross, a serviceman, was sued for injuries allegedly sustained by plaintiffs in an automobile accident. Shortly after the action was filed, defendant requested a stay pursuant to the Soldiers' and Sailors' Civil Relief Act. The district court found that defendant's testimony was adequately preserved by his deposition, and denied the stay on the basis that the serviceman's ability to conduct his defense was "not materially affected by reason of his military service." The Court of Appeals, *finding no abuse of the district court's discretion*, affirmed. 149 F.2d at 86. *Gross* does not stand for the proposition that "mere presence" in the armed services can never be a sufficient ground upon which to invoke a stay; rather, it stands only for the proposition that the denial of a stay was not an abuse of discretion under the facts of the case.

Similar to *Gross* is the somewhat more recent case of *Tabor v. Miller*, 389 F.2d 645 (3rd Cir. 1968). Like *Gross, Tabor* involved an automobile accident in which

one of the defendants, Stearns, was in the armed services. Shortly before trial, Stearns requested a stay, stating only that it would be "highly desirable" for him to complete his pilot training without interruption for the next eight months. The district court ordered that Stearns' deposition be taken two weeks before trial, during his Christmas leave, and denied the stay. On appeal the Third Circuit affirmed, noting that Stearns had never contended that it would be "impossible" for him to attend trial, and that the district court *did not abuse its discretion* in concluding that Stearn's deposition testimony on the eve of trial adequately preserved his rights. Like *Gross, Tabor* does not stand for the proposition for which petitioners cite it, and does not conflict with the decision in the instant case or with *Pacific Greyhound. Tabor* merely states that a court could properly conclude that a serviceman's rights would not be materially affected by his absence at trial where he was deposed shortly before that trial.

The final member of petitioners' alleged "conflicting" trilogy is *Crowder v. Capital Greyhound Lines*, 169 F.2d 674 (D.C. Cir. 1948). Plaintiff filed a personal injury action against defendant in 1941 and later joined the military. Plaintiff's counsel requested and was granted a continuance in 1944 because plaintiff's whereabouts was unknown. The case languished for two more years, at which point defendant moved to dismiss for lack of prosecution. Plaintiff's counsel made no effort to ascertain where plaintiff was or even whether he was still in the military. The trial court dismissed the action, and the Court of Appeals affirmed, against stating that "the trial court was justified *in its discretion* in ordering the dismissal of the action." 169 F.2d at 675 (emphasis added).

Even a cursory analysis of the three above cited cases makes it clear that petitioner's alleged "conflict" has no substance. The courts in *Gross, Tabor*, and *Crowder* merely held that the trial courts in those cases did not abuse their discretion in finding that the servicemen's rights were adequately protected. Such holdings' surely do not conflict with *Pacific Greyhound*, where the California Supreme Court held that the trial court did not abuse its discretion in *granting* a stay. Neither do these decisions conflict with the Court of Appeal in the present case, where undisputed evidence demonstrated that petitioners would attempt to invoke collateral estoppel to prejudice the rights of a serviceman. Petitioners' strained attempt to create a "conflict" and thereby gain this court's attention should be rejected.

B. Consistent With Statutory and Case Law, The Court of Appeal Properly Assigned The Burden of Proof to the Defendants Under the Circumstances of This Case.

Petitioners claim that it was error for the Court of Appeal to require them to come forward with evidence that serviceman Victor Buttlers' rights would not have been materially affected absent a stay of the entire action. They contend that this determination conflicts with this court's decision in *Boone v. Lightner*, 319 U.S. 561, 63 S.Ct. 1223 (1943). An examination of *Boone* and of section 521 of the Act itself reveals no such conflict, and that placing the burden on defendants under the circumstances of this case was entirely proper.

Section 521 of the Act provides that a court shall stay an action in which a plaintiff is in the military "unless, in the opinion of the court, the ability of plaintiff to prosecute the action . . . is not materially affected by reason of his military service." In *Boone v. Lightner,*

supra, 319 U.S. 561, 63 S.Ct. 1223 (1943), this court observed that the Act makes no express provision as to which party has the burden of coming forward with the evidence, and then stated:

> "We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. *One case may turn on an issue of fact as to which the party is an important witness* . . . . The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance . . . . To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discrimination application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment." 319 U.S. at 569-570, 63 S.Ct. at 1228-1229 (emphasis added).

This court has thus made it clear that it depends on the facts and circumstances of the given case as to whom the burden of going forward with the evidence rests upon. The California Court of Appeal in this case determined that the burden rested upon defendants. This was so because defendants conceded that they would have attempted to invoke collateral estoppel to bar some or all of serviceman Victor Buttler's claims if they were

successful in defending a separate earlier trial against co-plaintiffs Leroy and Donald Buttler. Under these circumstances, it certainly seems reasonable to place the burden of proof upon the City to show that the use of collateral estoppel would not materially affect Victor Buttler's ability to prosecute his lawsuit. As envisioned by this court in *Boone*, it would certainly seem to make more sense to have this information come from the City.

Petitioners' assertion that the Court of Appeal ignored *Boone* is groundless. Both *Boone* and the Act itself allow a court to place the burden of proof upon the party resisting the stay if such an assignment is reasonable under the facts of the case. That assignment was reasonable here, and this case therefore does not conflict with *Boone* or section 521 of the Act itself.

III.

CONCLUSION.

The petition for writ of certiorari fails to show why review by this court is either proper or necessary. This case turns upon the interpretation of a state statute, and therefore is not subject to review by this court. Further, even if application of a federal statute is involved, the unpublished decision of the California Court of Appeal does not in any way conflict with existing case law. For these reasons, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 23, 1987, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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Washington, D.C. 20543
(Original and forty copies)

Clerk of the Los Angeles
Superior Court for the
Hon. Norman R. Dowds
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Clerk, California Court of
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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)